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Edward Street Daycare Center, Inc. and Truck Drivers Union Local 170, a/w International Brotherhood of Teamsters, AFL-CIO. Case 1-CA-36397

September 30, 1998

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND HURTGEN

Pursuant to a charge and amended charge filed on June 30, 1998, and July 24, 1998, respectively, the Acting General Counsel of the National Labor Relations Board issued a Complaint and Notice of Hearing on July 30, 1998, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 1-RC-20792. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On September 11, 1998, the Acting General Counsel filed a Motion for Summary Judgment. On September 14, 1998, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

In its answer the Respondent admits its refusal to bargain but attacks the validity of the certification on the basis of the Board's unit determination in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence,¹ nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding. We therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate*

¹ The Respondent attached to its response four documents that it characterizes as "new evidence." However, the Respondent has not adequately explained why that evidence was not adduced at the representation case hearing. See *NLRB v. Joseph E. Decker & Sons*, 569 F.2d 357, 363-364 (5th Cir. 1978).

Glass Co. v. NLRB, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a corporation with an office and place of business in Worcester, Massachusetts, has been engaged in the operation of a day care center.

During the calendar year ending December 31, 1997, the Respondent, in conducting its business operations, derived gross revenues in excess of \$250,000 and purchased and received at its Worcester facility goods valued in excess of \$5000 directly from points outside the Commonwealth of Massachusetts.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.²

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Certification

Following the election held May 15, 1998, the Union was certified on May 27, 1998, as the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time head teachers, assistant head teachers, assistant head teachers in training, teachers in training, the coordinator of billing and operations, the cook, the assistant cook, maintenance and housekeeping employees, and the bookkeeper employed by the Employer at its Worcester, Massachusetts location, but excluding all other employees, the executive director, the confidential secretary to the executive director, the coordinator of social services, managers, guards, and supervisors as defined in the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

B. Refusal to Bargain

About June 23, 1998, the Union, by letter, requested the Respondent to recognize and bargain, and, by letter dated June 26, 1998, and at all times since June 26, 1998, the Respondent has failed and refused. We find that this failure and refusal constitutes an unlawful refusal to rec-

² Although the Respondent's answer to the complaint states that it is without knowledge as to whether the Union is a Sec. 2(5) labor organization, the Respondent failed to raise this issue in the underlying representation proceeding. Accordingly, we find that the Respondent is precluded from now litigating the matter in this proceeding. See *Biewer Wisconsin Sawmill*, 306 NLRB 732 fn. 1 (1992); and *Wickes Furniture*, 261 NLRB 1062, 1063 fn. 4 (1982).

ognize and bargain in violation of Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

By failing and refusing on and after June 26, 1998, to recognize and bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to recognize and bargain on request with the Union, and, if an understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to recognize and bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5th Cir. 1964), *cert. denied* 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), *enfd.* 350 F.2d 57 (10th Cir. 1965).

ORDER

The National Labor Relations Board orders that the Respondent, Edward Street Daycare Center, Inc., Worcester, Massachusetts, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with Truck Drivers Union Local 170, a/w International Brotherhood of Teamsters, AFL-CIO, as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time head teachers, assistant head teachers, assistant head teachers in training, teachers in training, the coordinator of billing and operations, the cook, the assistant cook, maintenance and housekeeping employees, and the bookkeeper employed by the Employer at its Worcester, Massachusetts location, but excluding all other employees, the

executive director, the confidential secretary to the executive director, the coordinator of social services, managers, guards, and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post at its facility in Worcester, Massachusetts, copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 1 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 26, 1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 30, 1998

Sarah M. Fox, Member

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

³If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with Truck Drivers Union Local 170, a/w International Brotherhood of Teamsters, AFL-CIO, as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time head teachers, assistant head teachers, assistant head teachers in training, teachers in training, the coordinator of billing and operations, the cook, the assistant cook, maintenance and housekeeping employees, and the bookkeeper employed by us at our Worcester, Massachusetts location, but excluding all other employees, the executive director, the confidential secretary to the executive director, the coordinator of social services, managers, guards, and supervisors as defined in the Act.

EDWARD STREET DAYCARE CENTER, INC.